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Essay

AMERICA'S TRANSFORMATION: THE ARC OF JUSTICE BENDS TOWARD THE DEAF COMMUNITY

Michael A. Schwartz*

*But a little word from the fingers of another fell into my hand
that clutched at emptiness, and my heart leaped to the rapture
of living.*

—Helen Keller¹

I. THE PAST: A STORY OF AN INACCESSIBLE WORLD

I grew up in the 1950s, coming of age the day John F. Kennedy was shot and killed in Dallas on November 22, 1963. I had just turned ten years old, and the assassination of the President and the subsequent shooting of his assassin on television marked a turning point in the twentieth century—the moment television grew up. President Kennedy's death was a momentous international event, with the world stopping to mourn this young charismatic leader taken before his time. The sad eloquence of the First Lady, Jackie Kennedy, and her brother-in-law, Robert F. Kennedy, lent poignancy to the nearly universal sorrow over Kennedy's death. Televised images of that fateful weekend stamped the national consciousness: Walter Cronkite looking up at the clock and tearing up as he announced the President's death; bedlam at Parkland Memorial Hospital swarming with doctors and Secret Service agents; Lyndon Baines Johnson being sworn into the presidency, the blood-stained Jackie Kennedy standing next to him; the arrival of the presidential plane at Andrews Air Force Base in Washington; Lee Harvey Oswald wincing in pain as Jack Ruby shot him in the stomach in the basement of the Dallas County Jail; the three-year-old John F. Kennedy, Jr., saluting his father's casket. I was just a little boy in fifth

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¹ *Helen Keller Quotes*, MINN ST. ACADS., <http://www.msa.state.mn.us/SharedServices/doubleimpact/helenkellerquotes.asp> (last visited Feb. 20, 2011).

grade as I absorbed the enormity of a presidential assassination. Indeed, television and I came of age together.

But my experience of television radically varied from my older brother, Gil, who could hear. In 1963, the news coverage of President Kennedy's assassination was not captioned. Captioning would not come for another decade or so. So for me, the experience of the weekend of November 22, 1963, was visual and incomplete. I tried to make sense of the fast-moving events, but I had no access to the commentary and other auditory feedback being generated by TV news. My brother, on the other hand, had access, and he became my interpreter, my communication line to the larger world.

We were watching television Sunday afternoon, November 24th, when we witnessed the shooting of Lee Harvey Oswald. We watched as Dallas police moved Oswald through the basement and saw Jack Ruby lunge toward Oswald. The screen immediately blurred as people started jostling each other, including the cameraman. Suddenly, my brother turned to me and said, "I heard a gunshot." We sat there, jaws agape—we just saw a shooting on national TV. Although my family strove to keep me posted on the news, sharing what they heard on the radio or television during the traumatic weekend of November 22, 1963, I came to the news late, behind my hearing friends. My connection to community that television and radio created for all of us that day was incomplete because of the lack of access.

Other media in the 1960s were inaccessible. I couldn't listen to the radio. Movies bore no captions. Theater shows had no open captioning. Museum lectures, group tours, historical reenactments, classroom exchanges—none of these educational settings had any visual means for access. For me, the free exchange of ideas and information was problematic. To a great extent, I was cut off from American culture. I had to look for a connection my own way.

I responded in three ways to the inaccessible world of my youth. First was the newspaper. My father subscribed to *The New York Times* and I became addicted to the paper. It had interesting articles about the events of the day: the 1960 Israeli capture of the Nazi war criminal, Adolf Eichmann, in Argentina; the 1960 election of John F. Kennedy, the country's first Roman Catholic president; the 1961 Bay of Pigs invasion of Cuba; the 1962 Cuban missile crisis; Rev. Dr. Martin Luther King's "I Have a Dream" speech in Washington on August 28, 1963; Barry Goldwater's run against L.B.J. in the 1964 election; the electrifying emergence of the Beatles on *The Ed Sullivan Show* in February 1964; U.S. Marines landing in Vietnam in March 1965; the sniper, Charles Whitman, gunning down scores of people from the University of Texas Tower in

August 1966; the 1967 Six Day War in the Middle East; the assault by Viet Cong guerrillas and North Vietnamese Army regulars throughout South Vietnam in January 1968 that came to be known as the Tet Offensive; the assassinations of Dr. King and Robert F. Kennedy, two months apart in the spring of 1968; the fall of L.B.J. and the rise of Richard Nixon. The sixties and early seventies were a turbulent time, and *The New York Times* created a connection with the wider world for me.

My second response was the discovery of silent movies and non-verbal theater. I fell in love with the Little Tramp, Charlie Chaplin's character, as he silently met the challenges of the world in *City Lights*, *Modern Times*, and *The Great Dictator*. I needed no captions to cheer on my hero. I clearly remember the day my mother took me as a nine-year-old to see the great French mime, Marcel Marceau. No captions or interpreters were necessary to enjoy mime. I felt a powerful surge of joy when, for the first time in my life, what I was seeing on the stage was completely accessible. The hunger for connection and community felt sated as I watched Marceau weave his magic on the stage. I felt, for the first time, at one with the audience; when they laughed, I laughed; when they wept, I wept. From the moment I discovered Marceau, I realized the infinite possibility of non-verbal communication. Submersed in a Marceau performance, I belonged to humankind. I also discovered Mummenschanz, a Swiss mime troupe working with masks and large tubes that covered their bodies. Fool Moon—two delightful clowns, one mean, one nice—spun wonderful tales of human beings fighting insuperable odds, all without words. Blue Man Group continues the tradition, albeit with loud, pounding music that pulsates in one's stomach and chest. Silent movies and non-verbal theater saved my life—it reaffirmed my sense of what it means to be human and reminded me of my link to the world.²

Third was dinner with my family every night. Sitting around the family table, we talked about the political and social struggles of the times: civil rights marchers down South, demonstrations against the war in Vietnam, and race riots in Watts and Detroit. My mother served as an interpreter for the conversations around the table. I did not have trouble understanding my father and my brother in one-on-one talks. Since I knew no sign language, I relied entirely on my lip-reading skills and was able to communicate with my family. This connection was very important to me. It nurtured and nourished me.

² I estimate I saw approximately 75 live performances by Marcel Marceau. The nuanced humor and deeply intelligent commentary of these mimes and clowns—delivered without speech—enthralled me and made me feel connected to a larger community.

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Helen Keller was reported to have once said, “Blindness separates a person from things, but deafness separates him from people.”³ To a certain extent, it is true that deafness complicates communication with people who are not deaf.⁴ To a certain extent, indeed, it is true—at least for me—that deafness constitutes a daily challenge to adapt to a world that revolves around sound and is built by and for hearing human beings. As long as nothing existed to convert sound into visual information readily accessible to the eyes of a deaf person, there would always be an uphill battle for access, creating a disconnect between me and my community. For years I treated my deafness as a private trouble rather than as a public issue implicating social policies, practices, and choices. If it wasn’t my fault for being deaf, it was certainly my burden to be borne in silence. As long as I had my newspaper, silent movies and non-verbal theater, and my family, I was satisfied.

II. THE TRANSITION TOWARD GREATER ACCESS

The civil rights movement of the sixties gave birth to a civil rights movement for people with disabilities, including deaf and hard of hearing people. The language of rights became a rallying cry for disability rights advocates whose dreams of emancipation and justice drew inspiration from the struggles of African Americans and women. Disability started to emerge from the closet as a private trouble and took on more of the hue of a public issue as the demands of disabled people for justice, equality, and inclusion took on greater heft. More people started to recognize that disability cut across class, race, gender, sexual orientation, ethnicity, religion, and age; an understanding dawned that disability was universal. More attention was brought to bear on the problem of inaccessibility—barriers that marginalized and ostracized people on the basis of a human condition. Social policies and practices that institutionalized discrimination against people with disabilities began to receive criticism. For most of my youth during the 1960s and 1970s, laws underlining these social policies and practices failed to address effective communication access such as captioning, interpreters, and auditory amplification.

³ *Overview on Deaf-Blindness*, NAT’L CONSORTIUM DEAF-BLINDNESS, <http://www.nationaldb.org/NCDBProducts.php?prodID=38> (last visited Feb. 20, 2011).

⁴ I capitalize “D” to indicate deafness as a cultural phenomenon and a small “d” to indicate deafness as a medical condition. I also use “Deaf” to include people who are hard of hearing. The “complication” of deafness has less to do with a person’s hearing loss and more to do with policies, practices, and procedures that render both parties to communication, hearing and deaf, unable to communicate effectively with each other. A lack of interpreters, CART, and captioning underlies much of the “complication.”

A seismic shift took place in the late 1960s with the emergence of the National Theatre of the Deaf ("NTD"), co-founded by Bernard Bragg, a Deaf theater artist who broke into show business as a nightclub entertainer in the 1950s.⁵ The NTD revolutionized America by bringing sign language out into the open, stripping it of its stigma and shame and transforming it into a legitimate language worthy of study and pride.⁶ Bragg developed the language of the visual vernacular—language on the hands—and pioneered the idea that sign language was beautiful, artistic, and creative. Signed theater entertained and excited Americans, changing their attitudes toward deafness and Deaf people. The NTD taught people—both deaf and hearing—to appreciate and respect the sign language of the Deaf community. Sign language classes exploded. People swelled the ranks of sign language interpreters. The emergence of American Sign Language and Deaf culture, in turn, elevated the struggle by Deaf people for greater inclusion, integration, and equality in American life.

Two events rocked the world for Deaf people. The first was the passage of Section 504 of the Rehabilitation Act of 1973, a national law protecting qualified individuals from discrimination based on their disability:

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.⁷

Although Section 504 was passed in 1973, it was not until 1978, after a long contentious battle to force the Carter administration to issue implementing regulations that Section 504 came into full force. Even

⁵ See *Life and Works of Bernard Bragg*, BERNARDBRAGG.COM, <http://bernardbragg.com/> (last visited Mar. 10, 2011) (providing a comprehensive listing of Bragg's works as well as detailing his involvement in the creation of the National Theatre of the Deaf). Although David Hays is named the founder, it is clearly certain that Bragg played an essential role in the founding of the NTD. *Id.* At a 2008 gala celebrating the NTD's 40th anniversary, Bragg was awarded the first "Bernard Bragg Lifetime Achievement Award." *Id.* Hays said of Bragg, "I may be the founder . . . but without Bernard Bragg, there would be no NTD." *Id.*

⁶ See *History of National Theatre of the Deaf*, NAT'L THEATRE DEAF, <http://www.ntd.org/about.php?id=history> (last visited Feb. 20, 2011).

⁷ 29 U.S.C. § 794(a) (2006).

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then the law was limited by the provision that the program or activity receive federal funds in order to come under the law's obligations.⁸ So much of America's economic and social actors on Main Street were not recipients of federal largesse, so many were left untouched by Section 504: doctors, lawyers, private businesses catering to the public, and employers. Section 504 raised Deaf people's consciousness about their status in the world as a civil rights issue and generated a sense of hope that things would get better. Ironically, that hope led to a sense that Section 504 was not enough, and in the late 1970s and 1980s the Deaf community came alive in the political arena, particularly with the 1988 Gallaudet University uprising that led to Gallaudet's first Deaf president. The nation took notice of this historic protest.⁹

The second event was the appearance of television captions. I remember watching my first captioned ABC News presentation, and the old quickly gave way to the new. Prior to captions, I read the *TV Guide* synopsis of the television show I was watching in order to figure out the plot and the characters. However, I missed key moments in the story and the punch lines. Once captions arrived, I could not tolerate that "catch as catch can" approach. Captions spoiled me; if a program did not have captions, I switched channels. With the advent of television captioning, Deaf people gained entry into American popular culture. Visual images long opaque became transparent and accessible. This wrought a revolution in the Deaf community, enabling many to become more connected to the mainstream American community.

III. MY ENTRY INTO THE LEGAL PROFESSION AND SURPRISES ALONG THE WAY

The civil rights movement that did so much to raise consciousness—including my own—about racial and economic justice contributed to my decision to become a lawyer. Spurring me to enter law school was an encounter with racial discrimination against African American schoolchildren of the North Carolina School for the Deaf in Morganton, North Carolina, where I worked briefly as a drama teacher. I complained to the North Carolina chapter of the American Civil Liberties Union ("ACLU"), and much to my pleasant surprise, the ACLU effectuated positive change at the school. Having been politicized by the war in Vietnam and the movement for justice in the United States, I saw

⁸ See *id.* (stating that Section 504 is applicable to programs or activities that "receiv[e] Federal financial assistance").

⁹ See Kelly McAnnany & Aditi Kothekar Shah, *With Their Own Hands: A Community Lawyering Approach to Improving Law Enforcement Practices in the Deaf Community*, 45 VAL. U. L. REV. 875, 915-16 (2011) (discussing in greater detail the Gallaudet protest in 1988).

this experience in North Carolina as an impetus to enroll at New York University School of Law in 1978.

This was all prior to the enactment of the Americans with Disabilities Act in 1990 ("ADA").¹⁰ Little was I to know that some of the most recalcitrant opponents of equal treatment and communication access would be lawyers and judges. As a newly minted member of the legal profession, I joined the Association of the Bar of the City of New York ("Association") in 1981 only to find their meetings were not accessible because the Association did not provide interpreter services. I requested these services and my request was denied. Next, I sought to become qualified for the Assigned Counsel Plan for New York City,¹¹ but in order to be listed as an 18B attorney, I had to take qualification classes through the New York County Lawyers Association. Here, too, my request for interpreter services was denied. It took the intervention of the Appellate Division, First Department, of the New York State Supreme Court to force the County Lawyers Association to provide me with interpreters for the qualifying classes. Next, I joined the American Bar Association's Young Lawyers Division and requested interpreter services at ABA meetings, to no avail. I fought this denial all the way up to the ABA's House of Delegates where I won a resolution requiring the ABA to provide interpreters when a deaf member needed it at ABA meetings. I spent so much energy during the 1980s fighting my own profession to persuade lawyer organizations to do the right thing even if the law did not mandate it.¹²

IV. PASSAGE OF THE AMERICANS WITH DISABILITIES ACT OF 1990: GLIMMER OF A NEW DAWN

Recognizing that the promise of Section 504 was largely unfulfilled, Congress drafted a stronger law, one that would reach most of the

¹⁰ See *infra* Part IV (discussing the Americans with Disabilities Act).

¹¹ See generally *Assigned Counsel Plan*, N.Y. ST. UNIFIED CT. SYS., <http://www.courts.state.ny.us/courts/ad1/committees&programs/18b/index.shtml> (last visited Feb. 20, 2011).

¹² Contrast these experiences with my first two employers, the Hon. Vincent L. Broderick of the United States District Court for the Southern District of New York, and the Hon. Robert M. Morgenthau, District Attorney for New York County. As law clerk to Judge Broderick, I obtained sufficient interpreter coverage to enable me to perform the essential functions of my clerkship with the judge. As Assistant District Attorney in Mr. Morgenthau's Appeals Bureau, I likewise obtained sufficient interpreter coverage in order to do my work as an Appeals Assistant D.A. where I argued criminal appeals on behalf of the People of the State of New York. I was the first deaf Assistant D.A. to appear before the Appellate Division, First Department, of the New York State Supreme Court, and the New York Court of Appeals. In fact, my experiences served as a basis for the NBC drama, *Reasonable Doubts*, starring Marlee Matlin as a deaf Assistant D.A.

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economic, social, and governmental activity in the country, regardless of whether the service, program, or activity received federal financial assistance. The ADA prohibits discrimination on the basis of disability in employment, the provision of state and local government services, places of public accommodations, commercial facilities, transportation, and telecommunications.¹³ To be protected by the ADA, a person must have either a disability or have a relationship or association with an individual with a disability.¹⁴ An individual with a disability is defined by the ADA as a person who has “a physical or mental impairment that substantially limits one or more major life activities”;¹⁵ a person who has a history or “record of such an impairment”;¹⁶ or a person who is perceived by others “as having such an impairment.”¹⁷ The preamble to the ADA clearly articulates Congress’s intention

to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; to ensure that the Federal Government plays a central role in enforcing the standards established in [the ADA] on behalf of individuals with disabilities; and to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.¹⁸

The congressional intention for a strong and comprehensive law combatting discrimination could not be clearer.

Title I of the ADA requires employers with fifteen or more employees to provide qualified individuals with disabilities an equal opportunity to benefit from the full range of job-related opportunities available to employees without disabilities.¹⁹ Thus, the law prohibits discrimination in recruitment, hiring, promotion, training, pay, social activities, and other benefits and privileges of employment.²⁰ Questions

¹³ See generally 42 U.S.C. §§ 12101–12213 (2006 & Supp. II 2008).

¹⁴ *Id.*

¹⁵ *Id.* § 12102(1)(A) (Supp. II 2008).

¹⁶ *Id.* § 12102(1)(B).

¹⁷ *Id.* § 12102(1)(C).

¹⁸ *Id.* § 12101(b) (statutory numbering omitted) (2006).

¹⁹ *Id.* §§ 12111–12117 (2006 & Supp. II 2008).

²⁰ *Id.* § 12112(a) (Supp. II 2008).

about an applicant's disability before a job offer is made are restricted, and employers must provide reasonable accommodations for known physical or mental disabilities of otherwise qualified individuals with disabilities, unless it results in undue hardship to the employer.²¹

Title II covers all services, programs, and activities of State and local governments regardless of the governmental entity's size or receipt of federal financial assistance.²² State and local governments must provide people with disabilities an equal opportunity to benefit from all of their services, programs, and activities (e.g., public education, employment, transportation, recreation, health care, social services, courts, voting, and town meetings).²³ State and local governments, whether constructing new buildings or renovating existing ones, are required to follow specific architectural standards that ensure accessibility for people with disabilities.²⁴ Governments are also required to communicate effectively with people who have hearing, speech, or vision disabilities.²⁵ Finally, governments must, where necessary to avoid discrimination, make reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination, unless public officials can demonstrate that doing so would "fundamentally alter the nature of the service, program, or activity" being provided.²⁶ For example, law enforcement agencies must provide effective communication access to deaf and hard of hearing people.

*McAnnany and Kothekar Shah – Police and Community Lawyering*²⁷

Yet, effective communication access to law enforcement has been problematic for members of the Deaf community—victims, witnesses, and suspects have trouble communicating with the police—and traditional legal advocacy such as litigation has failed to effectuate change beyond the specific parties involved in the criminal justice system. This is one of several topics related to the Deaf community explored in this special Issue of the *Valparaiso University Law Review*.

²¹ *Id.* § 12111(9)–(10) (2006) (defining the terms "Reasonable accommodation" and "Undue hardship").

²² *Id.* §§ 12131–12165.

²³ *Id.* § 12132.

²⁴ *Id.* §§ 12146–12147 (stating in regard to existing facilities that "it shall be considered discrimination . . . for a public entity to fail to make such alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities").

²⁵ *Id.* §§ 12131–12165.

²⁶ 28 C.F.R. § 35.130(b)(7) (2010).

²⁷ McAnnany & Kothekar Shah, *supra* note 9.

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Kelly McAnnany and Aditi Kothekar Shah weigh in with their article, *With Their Own Hands: A Community Lawyering Approach to Improving Law Enforcement Practices in the Deaf Community*, which offers a critique of traditional advocacy like litigation and suggests the adoption of “community lawyering” — “a multi-faceted approach to achieve comprehensive, sustainable reform at the direction of the stakeholders in the community.”²⁸ To McAnnany and Kothekar Shah, flexibility and change are the linchpins of a plan that draws on community organizing principles: valuing stakeholders’ experience as knowledge; fostering a creative, interdisciplinary, systemic approach to change; and raising consciousness. McAnnany and Kothekar Shah suggest adding to the community lawyer’s arsenal a number of change agents: publicity, political pressure, legislative advocacy, and community education. Their article looks at the problems posed for deaf people in encounters with the police, the legal landscape confronting the Deaf community; the shortfalls of traditional legal advocacy, particularly Department of Justice advocacy, which has limited ability to effectuate systemic change; the elements, strengths, and weaknesses of the community lawyering model; and ways this model can benefit the Deaf community.

The police are not the only problem for the Deaf community. Courts are particularly troublesome, too.

*Pravda – Courts*²⁹

For example, Teri Mosier asked the State of Kentucky to provide interpreters when she appeared in the state’s Courts of Justice on behalf of clients, and the state refused. Scott Harrison received services of a real-time court reporter during his stint as a public defender in Florida, but when he entered private practice as a criminal defense attorney and asked for real-time reporters to transcribe criminal trials and other hearings, his request was denied. These stories illuminate Douglas M. Pravda’s article, *Understanding the Rights of Deaf and Hard of Hearing Individuals to Meaningful Participation in Court Proceedings*, a review of the legal rights of deaf and hard of hearing individuals to appropriate courtroom accommodations. In Part I, Pravda looks at the primary sources of the legal right of deaf and hard of hearing participants in the judicial system to effective communication access: the ADA, Section 504 of the Rehabilitation Act, the Court Interpreters Act, the U.S. Judicial Conference’s policy on interpreters, and the new Department of Justice

²⁸ *Id.* at 876–77.

²⁹ Douglas M. Pravda, *Understanding the Rights of Deaf and Hard of Hearing Individuals to Meaningful Participation in Court Proceedings*, 45 VAL. U. L. REV. 927 (2011).

regulations effective March 15, 2011. Although these laws apply to everyone, there are variations in legal rights depending on the capacity in which the deaf or hard of hearing person appears in the courtroom—litigant, lawyer, judge, witness, juror, or spectator. Pravda reminds us that the Supreme Court's ruling in *Tennessee v. Lane* recognized due process requires the state to accommodate deaf and hard of hearing people in its courts—failure to accommodate amounts to exclusion.

Pravda points out that advances in technology, particularly real-time reporting (some call it CART), have the potential to enhance access to the courts for deaf and hard of hearing people. He cites other significant advances like remote video interpreting as offering a possible solution to the shortage of interpreters in many places around the country. Though there is a long history of discriminatory treatment of deaf and hard of hearing people in the judicial system, Pravda's article uses mostly recent cases to trace how far the law has come and concludes that lack of knowledge—deaf people of their rights, judges and clerks of these rights and of technologies that can accommodate people, for example—is now a predominant barrier to equal access. In tracing the arc of justice, Pravda recounts the experiences of deaf criminal defendants, deaf civil litigants, deaf jurors, deaf witnesses, and deaf spectators, all with the idea that technology will ultimately provide deaf and hard of hearing people with enhanced access to the courts.

Title III³⁰ covers businesses and nonprofit organizations that are public accommodations, defined as private entities who own, lease, lease to, or operate facilities in twelve categories, including, but not limited to, restaurants, retail stores, hotels, movie theaters, private schools, doctors' and lawyers' offices, homeless shelters, transportation depots, zoos, and recreation facilities, including sports stadiums and fitness clubs.³¹ Public accommodations must not exclude, segregate, or otherwise treat unequally people with disabilities.³² They must comply with architectural standards for new and altered buildings; make reasonable modifications to policies, practices, and procedures; and provide effective communication with people with hearing, vision, or speech disabilities.³³ Courses and examinations related to professional, educational, or trade-related applications, licensing, certifications, or credentialing must be provided "in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements."³⁴

³⁰ See 42 U.S.C. §§ 12181–12189 (2006 & Supp. II 2008).

³¹ See *id.* § 12181(7) (2006).

³² *Id.* § 12182(b)(2)(A) (discussing what constitutes discrimination).

³³ *Id.* §§ 12181–12189 (2006 & Supp. II 2008).

³⁴ *Id.* § 12189 (2006).

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Take sports stadiums, for example, where millions of Americans spend a weekend afternoon enjoying a football game.

*Charmatz, Hedges-Wright & Ward – Stadiums*³⁵

As we learn from Marc Charmatz, Lindy Hedges-Wright, and Matthew Alex Ward in their article, *Personal Foul: Lack of Captioning in Football Stadiums*, Title III of the ADA requires access to professional and college football teams and stadiums for deaf or hard of hearing fans so they can “fully experience” football games.³⁶ Charmatz, Hedges-Wright, and Ward set out in an ambitious survey of the law of stadium access to explore the need for captioning of aural information and the types of accommodations that provide this service; to examine Titles II and III of the ADA, including current and future Department of Justice regulations for both titles, and Section 504 of the Rehabilitation Act of 1973 and its implementing regulations; and to discuss the October 2010 Sabino-Ohio State consent agreement leading to Ohio State’s accommodations for deaf and hard of hearing fans at Ohio State games. They also examine the advanced notice of proposed rulemaking and the accommodations in NFL stadiums, including judicial rulings regarding the legal obligation of the Washington Redskins to provide captioning on its scoreboards. The article concludes with an appendix that includes a description of the accommodations provided to deaf and hard of hearing fans at stadiums for professional football and baseball and college football games.

And, of course, there is the cinema.

*Waldo – Movies*³⁷

Silent movies ruled the cinema until late 1927 with the release of *The Jazz Singer*.³⁸ Shortly after, the “talkies” exploded and with that so did the dream of deaf and hard of hearing people for an enjoyable night out at the movies. Decades would pass before movie captioning technology became a reality and a new law came to pass, all part of “a long and

³⁵ Marc Charmatz, Lindy L. Hedges-Wright & Matthew Alex Ward, *Personal Foul: Lack of Captioning in Football Stadiums*, 45 VAL. U. L. REV. 967 (2011).

³⁶ With respect to college football games, the article covers only the major football programs whose stadiums seat thousands of fans and whose programs generate millions of dollars. These programs include colleges who are members of the six major Football Bowl Subdivision conferences: the Atlantic Coast Conference, the Big East Conference, the Big Ten Conference, the Big Twelve Conference, the Pac-10 Conference (soon to be the Pac-12 Conference), and the Southeastern Conference.

³⁷ John F. Waldo, *The ADA and Movie Captioning: A Long and Winding Road to an Obvious Destination*, 45 VAL. U. L. REV. 1033 (2011).

³⁸ See *The Jazz Singer*, FILMSITE, <http://www.filmsite.org/jazz.html> (last visited Mar. 10, 2011) (describing the “cinematic landmark” that was *The Jazz Singer*).

winding road" to equality and inclusion, as outlined by John F. Waldo's article, *The ADA and Movie Captioning: A Long and Winding Road to an Obvious Destination*.³⁹ According to Waldo, one would think the ADA would have compelled movie theaters to offer captioned movies,

but twenty years after the Act's passage, only a tiny fraction of the movies being shown in American theaters are accessible [to deaf and hard of hearing viewers]. This situation is attributable to the intransigence of the large corporate-owned theater chains, overly narrow judicial interpretations of the ADA, the failure of the statute itself, and the relevant federal agency's failure to define critical terms.⁴⁰

Finally, several court decisions and advances in captioning technology have convinced the Justice Department to propose new regulations that Waldo fears may not go far enough. In his article, Waldo looks at the structure of the ADA as it pertains to movie theaters, dissects judicial decisions that failed to uphold the promise of the ADA with respect to captioned movies, and examines the one case that may have reversed the trend, *Arizona ex rel. Goddard v. Harkins Amusement Enterprises, Inc.*⁴¹ Waldo then critiques the Justice Department's proposed captioning rule—half of all theater screens should be equipped to show closed-captioned movies over a five year period (ten percent of the screens per year)—as not going far enough and makes a series of arguments in support of a regulatory approach "that would advance the DOJ's objectives of transparency and ease of administration while still being consistent with the ADA's language."⁴² It is quite obvious that the ultimate destination is a movie experience accessible to all at any time anywhere. Deaf and hard of hearing people will ultimately enjoy the movies with their families and friends at any given time and place.

*Rosenblum – Title III Access Funding*⁴³

The theme of resistance runs through the experiences of many deaf and hard of hearing people, including me, and a big reason for that is money. Howard A. Rosenblum tackles that problem of resistance in his

³⁹ Waldo, *supra* note 37, at 1033.

⁴⁰ *Id.* at 1034.

⁴¹ 548 F. Supp.2d 723 (D. Ariz. 2008), *aff'd in part, rev'd in part*, 603 F.3d 666 (9th Cir. 2010)

⁴² Waldo, *supra* note 37, at 1035.

⁴³ Howard A. Rosenblum, *Communication Access Funds: Achieving the Unrealized Aims of the Americans with Disabilities Act*, 45 VAL. U. L. REV. 1061 (2011).

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article, *Communication Access Funds: Achieving the Unrealized Aims of the Americans with Disabilities Act*. To Rosenblum, access to medical care and legal representation is a basic right taken for granted by millions of Americans. But for millions more who are deaf or hard of hearing, that right is problematic despite Title III of the ADA because the law requires physicians and attorneys to incur out-of-pocket costs in providing effective communication access through appropriate auxiliary aids. These professionals do not want to cover these costs. Rosenblum sets out to examine the importance of communication in the medical and legal settings and the impact on delivery of services when communication is ineffective or non-existent.

Drawing on his experience as founder of the Midwest Center for Law and the Deaf ("MCLD"), Rosenblum explains how as an advocate for the deaf community in the Midwest, the MCLD seeks to match deaf and hard of hearing people with appropriate attorneys. From the start, the MCLD had great difficulty convincing attorneys to shoulder their burden of providing effective communication, and over time even attorneys who were willing to shoulder this burden complained of the cost in serving a number of deaf clients in a single year. Rosenblum concludes from these difficulties that the referral center model of the MCLD is "an unsustainable solution both in the economic and practical sense."⁴⁴ Drawing on the ADA's Title IV scheme which funds telecommunications relay services through a tax on every person's telephone bill, Rosenblum proposes a Communication Access Fund established by a state's licensing authority that would raise funds—through professional licensing fees—for the purpose of subsidizing communication access in the offices of a physician or attorney. Only by doing so can America remove the financial disincentive in the professional setting and open doors for patients and clients who are deaf or hard of hearing. Rosenblum seeks to build on Title IV's scheme as a way of addressing the problem of money in the contexts of medicine and law. It is an idea worthy of deeper exploration.

We now turn to Title IV of the ADA.

Title IV provides for telephone and television access for people with hearing and speech disabilities.⁴⁵ Telephone companies are required to establish interstate and intrastate telecommunications relay services ("TRS") 365 days a year, 24 hours a day, 7 days a week.⁴⁶ Everyone's

⁴⁴ *Id.* at 1072.

⁴⁵ See 42 U.S.C. §§ 12201–12213 (2006 & Supp. II 2008).

⁴⁶ For a compiled listing of regulations applicable to telecommunications relay services, see *TRS Rules*, FCC, <http://www.fcc.gov/cgb/dro/4regs.html> (last visited March 6, 2011) (citing 47 C.F.R. §§ 64.601–64.606, 64.611, 64.613 (2010)).

telephone bill contains a fee which pays for these services. TRS enables callers with hearing and speech disabilities who use videophones ("VPs") and telecommunications devices for the deaf ("TDDs" or "TTYs"), and callers who use voice telephones to communicate with each other through a third party communications assistant. The Federal Communications Commission has set minimum standards for TRS services. Title IV also requires federally funded public service announcements to be captioned.⁴⁷ As the next article demonstrates, Howard Rosenblum is on solid ground in discerning within Title IV's scheme the seed of a solution to the problem of funding accommodations for deaf and hard of hearing people.

*Stein and Teplin – Titles III and IV*⁴⁸

Using a hypothetical to begin their article, *Rational Discrimination and Shared Compliance: Lessons from Title IV of the Americans with Disabilities Act*, Michael Steven Stein and Emily Teplin explain that a deaf person could easily telephone a dentist's office using a videophone and a sign language interpreter on screen and arrange an appointment. However, once the deaf person requests an interpreter, the dentist performs a simple cost-benefit analysis, calculating that on the basis of the fee collected for the visit, the dentist will lose money by paying for an interpreter. The outcome is predictable: the deaf person is welcome to bring his or her own interpreter at no cost to the dentist. To Stein and Teplin, this scenario encapsulates two ADAs in the story of communication access for deaf and hard of hearing people.

This is ironic: Title IV establishes a national telephone relay system enabling the deaf person to obtain, free of charge, sign language interpreter services in calling the dentist's office, and likewise, the dentist's office is able to speak with the prospective patient free of charge. However, despite the "specter of liability" from a lawsuit based on Title III of the ADA, most medical and legal professionals routinely calculate that it is in their self-interest not to accommodate deaf and hard of hearing people who seek their services.⁴⁹ Thus, the goal of Stein and Teplin's article is "to explain why Title IV has been so much more

⁴⁷ In response to a number of Supreme Court decisions that narrowed the definition of disability, rendering thousands, if not millions, of people ineligible for ADA protection, Congress passed an amendment to the ADA which restored Congress's original understanding of what constitutes a disability and made it easier for a plaintiff with a disability to press ahead with the claim. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

⁴⁸ Michael Steven Stein & Emily Teplin, *Rational Discrimination and Shared Compliance: Lessons from Title IV of the Americans with Disabilities Act*, 45 VAL. U. L. REV. 1095 (2011).

⁴⁹ *Id.* at 1097-98.

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effective in achieving its goals than Titles I through III.”⁵⁰ The two authors offer a simple hypothesis: Title IV provides greater access to telecommunication services because everyone who uses a phone shares the cost of access, whereas under Titles I, II, and III, employers, governments, and places of public accommodation, respectively, bear the costs of accommodating deaf people when necessary.⁵¹ Title IV socializes the cost of accommodating people, while the other titles of the ADA do not.

To Stein and Teplin, the ADA locates “disability” in the environment rather than in the body of the individual—disability is seen as the outcome of policies, practices, and the built environment that operate to marginalize or otherwise exclude a person because of a physical or mental condition—and “accordingly imposes costs associated with redressing inaccessibility on entities that foster the inaccessible or disabling environments.”⁵² However, unlike discrimination in other contexts, “equality for deaf people requires real, quantifiable, ongoing expenditures.”⁵³ Herein lies the rub. Although the ADA rightfully requires proactive, affirmative steps to ensure effective communication, enhancing compliance, according to Stein and Teplin, “requires a broader and preemptive distribution of the cost of communication access.”⁵⁴ With Title IV in mind, the authors illustrate how entities covered by Titles I, II, and III semi-voluntarily adopted Title IV’s cost distribution scheme, and suggest ways to expand Title IV’s success beyond telephone access so as “to address the entrenched problem of economically rational discrimination” in contexts other than telephone access.⁵⁵

V. POST-ADA NONCOMPLIANCE AND BEGRUDGING COMPLIANCE

Notwithstanding the comprehensive statutory scheme of the ADA and its mandate for barrier removal,⁵⁶ as outlined by the above-listed authors, I still encountered difficulties with lawyers and judges. For example, when the ADA became effective in 1992,⁵⁷ I applied to 135 law

⁵⁰ *Id.* at 1098.

⁵¹ *Id.* at 1100.

⁵² *Id.* at 1099.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1100. Some of these ways include mandatory communication access funds, elimination of Title IV’s prohibition of funding relay services between people in the same room, and expansion of the ADA’s tax credit.

⁵⁶ See 42 U.S.C. § 12101 (2006 & Supp. II 2008).

⁵⁷ Although the ADA was signed into law in 1990, certain provisions were not effective until two years later. See, e.g., *id.* §§ 12117, 12143, 12183 (2006).

firms in New York City, all located in the borough of Manhattan. Approximately a third were top-tier firms, about a third were middle-sized firms, and a third were small firms. The firms were general practice firms, engaging in areas of the law that were familiar to me through my eleven years of legal employment. At that point in time, I held a B.A. in English with *cum laude* honors from Brandeis University, an M.A. in Theater Arts from Northwestern University, and a J.D. from New York University School of Law. My employment resume included a clerkship with a Southern District of New York federal judge, nearly eight years with the Manhattan D.A.'s Office, and a stint as a Trial Attorney with the Civil Rights Division of the U.S. Department of Justice.⁵⁸ Someone with an educational and employment background like mine certainly would have had a call back for an interview from at least one of the 135 firms. Instead, I received 135 rejection letters.

Why?

I mentioned in my cover letter that I was deaf. I explained that although I could not hear, I possessed excellent speech and lip-reading skills. I thought that honesty would be the best policy, and that because the newly enacted ADA prohibited an employer from rejecting my application because of my disability, I assumed that these firms would at least check me out. I was sadly mistaken. Indeed, my conviction that some, if not all, of these 135 law firms engaged in illegal discrimination against me was strengthened by an encounter with a boutique law firm in Manhattan four years later. By then, I had added experience as an Assistant Attorney General in the Civil Rights Bureau of the New York State Department of Law and had obtained an LLM degree from Columbia University. This time I did not mention my deafness in my cover letter, and the firm immediately called me in for an interview. However, when I walked in the door and identified myself, the senior partner was floored. He appeared very uncomfortable and as soon as we sat down at his desk, he picked up the telephone. I was not sure if he was receiving or placing a call, but he kept me waiting for a full twenty minutes while he talked on the telephone. When he hung up, he turned to me and said, "Well, thank you for coming in, but I'm afraid we have nothing open for you." I felt like I had been punched in the stomach. Even though my resume had gotten me in the door, old stereotypical attitudes about deafness tripped me up.

The Civil Court of the City of New York also tripped me up. Sitting in the front row of a Lower East Side theater one summer day in the late 1990s, I watched in amazement as a performer purposefully used an

⁵⁸ The point of this recitation of my achievements is not self-promotion but the context for what was to happen to me.

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industrial broom stick to sweep debris from the stage into my face. My eyes were filled with dust particles, and I was humiliated by the audience's laughter. So I sued the show for civil damages due to assault and battery. Shortly after I filed suit, I moved to Rochester, New York, to take up a post at the National Technical Institute for the Deaf. The move required me to travel to New York City for court dates in my case. Each time I went down for a court appearance with my attorney, the judge had not made arrangements for an interpreter despite the fact we alerted the court to the need for one. I do not believe the failure to provide an interpreter was intentional; rather, I think it was not a priority for the court despite being the law. Because of the repeated trips that drained my financial resources with no access to the court, I was forced to drop my lawsuit.

Finally, in the dawn of the twenty-first century, I experienced a number of barriers in place at the Clinic and Annual Conferences of the Association of American Law Schools ("AALS"). In August 2004, I commenced my current employment as law professor in the Office of Clinical Legal Education at Syracuse University where I direct the Disability Rights Clinic. Because of my position as clinical professor, I became interested in the educational and networking opportunities presented by the AALS conferences. I may have been the first signing Deaf professor to attend the conferences because it quickly became apparent that the AALS had a steep learning curve with regard to how to provide effective communication access. One example was the discussion at the entrance to a luncheon meeting over whether my two sign language interpreters would be allowed to enter the meeting with me. The AALS had not realized the interpreters needed to be seated with me and did not make a reservation for them. Their names were not on the list, and they were not provided with name tags like the attendees. Thus, officials stopped us before we entered the luncheon room and would not allow the interpreters to join me at my table. When I pointed out that my tablemates and I would not be able to communicate with each other without the interpreters, the AALS officials relented and allowed one interpreter to join me at the table. I was embarrassed for the interpreters, the officials, and myself.

A more fundamental problem with the AALS lies in its refusal to authorize gavel-to-gavel coverage. For the conferences to be inclusive and equally accessible, the AALS needs to provide a team of two sign language interpreters that are available to us for effective communication access. These interpreters need to be on duty starting from when I come downstairs in the morning to when I go back upstairs for the night. In addition to the interpreters, CART—computer aided realtime

transcription—must be available during plenary sessions, conference meals, and small group meetings. CART constitutes universal design when a projector connected to the provider's laptop projects the dialogue onto a large screen in front of the room, enabling everyone in the room to see the dialogue. This arrangement, easy and quick to set up, benefits everyone.⁵⁹

But that is not what the AALS is willing to offer. Instead, in order to have the assistance of sign language interpreters, I need to select the events I wish to attend—plenary sessions, conference meals, small group meetings, and extracurricular trips or lectures—four months in advance of the conference. CART will be available for the plenary sessions, but not for the small group meetings, and only on the provider's laptop screen. The effects of this policy are predictable. When the interpreters depart the hotel after fulfilling their obligations to cover the events I have selected four months prior to the conference, I cannot respond to last-minute developments: an impromptu invitation to a meal outside the hotel during the conference, a spur of the moment decision to form a small group for discussion, spontaneous social networking in the halls and restaurants of the conference hotels. The AALS's refusal to provide comprehensive coverage means that I participate on a limited basis and do not enjoy the same flexibility as my hearing colleagues to take advantage of the non-scripted opportunities.

For example, a hearing attendee can arrive at the conference without knowing which plenary sessions and small group meetings he plans to attend and can make last-minute decisions. I cannot do that. The attendee can leave the plenary session, meal, or small group meeting without a problem as no one notices his absence. However, I feel obligated to stay with the CART provider because four months ago, I said I wished to sit in on a certain plenary session, and if I leave the session, I asked for something I did not use.

In essence, the basic problem stems from thinking of the accommodations as "my" accommodations, when in actuality the interpreters and CART belong to all of us. Just as I need them to communicate with participants at the conferences, including officials of the AALS, the participants and the officials need interpreters and CART to communicate with me. These accommodations form a communication bridge that permits an exchange of information between me and the conference attendees. Moreover, placing an interpreter or a CART provider in front of me does not automatically solve the problem of communication access. The interpreter service is only as good as the

⁵⁹ For more information about CART, see *About CART*, NCRA, <http://ncraonline.org/NCRA/pressroom/AboutCART/default.htm> (last visited Mar. 10, 2011).

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interpreter. Likewise, a poor CART provider will provide poor captioning. The AALS, however, has never asked me, in the years I attended conferences, whether I was satisfied with the accommodations.

The AALS also does not seem to understand that the placement of interpreters (at my side, instead of on the stage or podium) and CART (a laptop screen instead of a large screen available to all) singles me out as the “disabled” attendee and draws attention to my difference. If the interpreter is on stage and the CART dialogue is on a large screen in front of the room, I can sit anywhere in the audience. But because the interpreters and CART are seen as “my” accommodations, I have to sit where they are placed in the room. They are like a flag at my table, drawing attention to me. This creates an atmosphere where instead of celebrating me as a member who brings something unique to the conference—after all, I may be the only culturally Deaf law professor in America, one who is profoundly deaf, signs fluently, and identifies himself as a full-fledged, card-carrying member of the Deaf community—I am seen as the Other who needs these accommodations. As a result of AALS policies at its conferences, I experience a sense of ostracism and marginalization, which the ADA was designed to eliminate.

Last but not least, when I reported for jury duty at the Onondaga County Court House several years ago, I discovered to my chagrin that the twenty-minute introductory videotape screened for potential jurors was not captioned. When I pointed this out to the Commissioner of Jurors, his response was that I had an interpreter, and that was sufficient. The problem was that the room was darkened for the movie, and absent a spotlight on the interpreter, I could not see her. Even if I was able to see her, watching an interpreter sign the words of the movie is not as effective as captioning. It is not access equal to that provided hearing jurors. My arguments fell on “deaf” ears.

Discrimination by lawyers is not a problem just for me. The United States Department of Justice was compelled to file a lawsuit against a Rochester-based attorney for failing to provide sign language interpreters to his deaf client in violation of the ADA.⁶⁰ Deaf people who come to my clinic tell me it is difficult to find a lawyer willing to pay for interpreter services. One of these lawyers was a member of the Assigned Counsel Plan, and my plea to the Plan’s operator to intervene and remind the attorney of her legal obligation under the ADA went nowhere. In fact, when I met with members of the Assigned Counsel Plan’s executive committee to discuss this problem, I encountered a

⁶⁰ See Settlement Agreement Between the United States of America and Gregg Tirone, Esq., Dep’t of Justice No. 202-53-20 (2004), <http://www.ada.gov/tirone.htm>.

surprising degree of hostility and incredulity from the judges and lawyers on the committee, who questioned the accuracy of my summary of the law and my motives for pressing the issue. This problem is highlighted in the next article.

*Nightingale Dawson – Title III Access*⁶¹

Access to lawyers' offices, a place of public accommodation under Title III of the ADA, is problematic for many deaf and hard of hearing people. As Elana Nightingale Dawson outlines in her article, *Lawyers' Responsibilities Under Title III of the ADA: Ensuring Communication Access for the Deaf and Hard of Hearing*, Title III of the ADA requires lawyers' offices to provide effective communication to deaf and hard of hearing people. Nightingale Dawson sees two major problems in applying the ADA to lawyers: first, many lawyers are unaware they come within the purview of the law, and second, the current design of the ADA "creates little opportunity for the rights afforded by Title III to be successfully enforced against lawyers."⁶² This is because traditionally lawyers are used to passing out-of-pocket expenses to the client, something the ADA forbids them from doing with respect to appropriate auxiliary aids such as sign language interpreters. Nightingale Dawson traces the history and implementation of Title III "to explain why its effectiveness has been limited within the legal profession . . . and [to] explore[] the realities facing deaf and hard of hearing people seeking legal representation."⁶³ Nightingale Dawson then proposes a three-prong approach to transform Title III so as to realize its promise: first, lawyers need to be educated about the reach and scope of the law with respect to their deaf and hard of hearing clients; second, financial resources—Communication Access Funds—need to be set aside to pay for effective communication; and third, Congress must reform Title III's enforcement scheme so as to strengthen the Justice Department's role and private actions as tools in carrying out the purpose of the law.

VI. TECHNOLOGY: A BLESSING OR A CURSE?

I remember well the transition from the telephone as an essentially useless device to a marvelous machine with the addition of a new-fangled device called a teletypewriter ("TTY"). My first TTY was a black

⁶¹ Elana Nightingale Dawson, *Lawyers' Responsibilities Under Title III of the ADA: Ensuring Communication Access for the Deaf and Hard of Hearing*, 45 VAL. U. L. REV. 1143 (2011).

⁶² *Id.* at 1143.

⁶³ *Id.*

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MCM, followed by a Siemens monster that must have weighed at least fifty pounds and spewed out paper with alternating black and red ink. Shortly thereafter the computer arrived, and I noticed the pace of work picking up quite dramatically. In the old days I would write out in long hand a draft of my brief or legal memorandum and hand it to the secretarial pool for typing; with the advent of the computer, I started writing and editing my own work, and the tempo speeded up as the demand for work increased in tandem with my output. Fast forward twenty years: E-mail, Blackberries, CART, and tablet computers have transformed the landscape for the deaf community, particularly its lawyers. That is the focus of the next article.

*Stanton – Technology and the ADA*⁶⁴

In *Breaking the Sound Barriers: How the Americans with Disabilities Act and Technology Have Enabled Deaf Lawyers to Succeed*, John F. Stanton focuses on how technology and the law have facilitated the successful careers of deaf lawyers. Stanton opens with a look at what is needed to properly accommodate a deaf person in the legal profession and segues into a pre-ADA history of deaf lawyers and the challenges they faced. To this day, technological advances and the ADA have had a significant impact on deaf law students and lawyers, and Stanton offers ideas about how to continue that transformation. In his review of accommodations, Stanton holds up one gold standard for many deaf lawyers: CART. The pre-ADA history is fascinating, and as Stanton points out, there was a dearth of deaf attorneys between the end of the 1920s and the mid-1950s, with the emergence of only two deaf attorneys then until the 1970s. Stanton offers a number of theories, one being the transition from apprenticeship training—its one-on-one format with a master lawyer was ideal for deaf people—to formal law school programs was detrimental to deaf applicants because admissions offices rejected their applications for admission. Even if a deaf applicant was admitted, no law required accommodations, and legal education did not encourage deaf people to consider the law as a career. Stanton also theorizes that the 1880 triumph of oralism over sign language in Milan, Italy, that lasted well into the 1970s resulted in “many deaf children in the late nineteenth and the first half of the twentieth centuries [growing] up with undeveloped or underdeveloped language skills.”⁶⁵

⁶⁴ John F. Stanton, *Breaking the Sound Barriers: How the Americans with Disabilities Act and Technology Have Enabled Deaf Lawyers to Succeed*, 45 VAL. U. L. REV. 1185 (2011).

⁶⁵ *Id.* at 1207.

Another problem lay in low expectations: deaf children and young adults who expressed an interest in the study of law encountered great skepticism. Even with the passage of Section 504, deaf students struggled mightily to succeed in law schools, and a few made it while many did not. Lack of accommodations played a role: many schools interpreted Section 504 to mean they could not discriminate in admission but could deny accommodations. And Section 504 did not reach private law firms because they did not take federal funding; consequently, hiring of deaf law graduates in the private sector was very low. Two deaf attorneys came to fame through a legal case: Lowell Myers defending Donald Lang on murder charges in Illinois, and Michael Chatoff representing Amy Rowley before the U.S. Supreme Court.⁶⁶ Media attention and Hollywood ensured that the idea of a deaf lawyer was no longer beyond the pale.

As Stanton describes it, passage of the ADA worked a transformation of the legal landscape for deaf lawyers. It required employers and public accommodations, such as schools, public services, and the courts to provide reasonable accommodations to deaf law students and lawyers. Advances in CART technology that enabled more and more deaf people to participate effectively in the classroom, the office, and the courtroom spurred the ADA-fueled transformation. However, difficulties remained as schools, courts, and employers resisted requests for expensive accommodations like interpreters and CART. The national telephone relay system established by the ADA's Title IV also helped deaf attorneys master the telephone, an essential component of a law office. Newer advances such as e-mail, televideo technology such as Skype and iChat, high definition screens, and voice-to-text technology promise to level the playing field even more.

*Ouellette – Bioethics of Cochlear Implants*⁶⁷

Technology of a different sort – the cochlear implant – also promises to transform the playing field, and Alicia Ouellette raises serious bioethical concerns about cochlear implants. In her article, *Hearing the Deaf: Cochlear Implants, the Deaf Community, and Bioethical Analysis*, Ouellette takes the Lee Larson case in Michigan as her starting point in an argument that ultimately concludes “more attention should be paid to the assumption that cochlear implantation is always in the best interests of deaf children.”⁶⁸ In the Larson case, the mother, Lee, and her two

⁶⁶ See *id.* at 1221–26 (discussing these cases in further detail).

⁶⁷ Alicia Ouellette, *Hearing the Deaf: Cochlear Implants, the Deaf Community, and Bioethical Analysis*, 45 VAL. U. L. REV. 1247 (2011).

⁶⁸ *Id.* at 1253.

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small boys, one two and the other three, were profoundly deaf and signed ASL. School officials urged Larson to have her sons surgically implanted with cochlear implants, and after research and discussion with others, the mother decided the cons outweighed the pros and said no. Lee Larson wanted her sons to be part of "Deaf culture," and to acquire mastery of their native language, ASL.⁶⁹ Subsequently the mother lost custody of her children on the basis of an unrelated neglect charge, and a guardian ad litem was appointed to represent the boys. The guardian ad litem filed a motion for a court order requiring the boys to be implanted, and the court ordered a trial to determine if the mother's refusal to consent to a cochlear implant was a form of medical neglect.

A battle ensued between the parties. The state insisted that unremediated deafness led to less than full development of the brain's ability to process language, and that implants would ensure a "healthy, happy, normal life."⁷⁰ Larson countered with evidence that she "made a thoughtful and careful decision to decline surgery [having] considered the risks, benefits, and alternatives to treatment."⁷¹ She made the point that access to language, not sound, is what develops the brain, and that the case was about her rights as a parent to decide whether to consent to implantation. The judge ultimately ruled in Larson's favor, relying on the autonomy argument.

Ouellette criticizes the state's decision to file a petition to override Lee Larson's choice as a mother and states,

[a] more careful bioethical analysis of issues raised with respect to cochlear implantation . . . shows that not only should efforts to mandate cochlear implants for eligible deaf children be rejected, but also more attention should be paid to the assumption that cochlear implantation is always in the best interests of deaf children.⁷²

Her article is in five parts. Part I examines the legal background of the question concerning who makes the decision about implants—the parents or the court. Part II explores the deaf and disability rights perspective on cochlear implants, and Part III contrasts that perspective

⁶⁹ See *id.* at 1247 (describing "Deaf culture"); see generally CAROL A. PADDEN & TOM L. HUMPHRIES, *INSIDE DEAF CULTURE* (2006) (providing an in-depth look at "Deaf culture"); CAROL A. PADDEN & TOM L. HUMPHRIES, *DEAF IN AMERICA: VOICES FROM A CULTURE* (1990) (same).

⁷⁰ Ouellette, *supra* note 67, at 1251.

⁷¹ *Id.*

⁷² *Id.* at 1253.

with the views of bioethicists who support implantation. Part IV asserts that a bioethical argument failing to account for evidence generated by deaf and disability rights scholars is problematic. Ouellette supports the use of “a more thorough informed consent process for parents who choose cochlear implantation for their deaf children.”⁷³

Ouellette rightfully criticizes the notion that deafness requires remediation. To her, the problem is not deafness; it consists of social policies and practices that fail to accommodate the communication needs of both parties.⁷⁴ Reviewing the bioethical arguments asserted by both sides, Ouellette discerns consensus on one issue: a parental choice in favor of cochlear implantation is ethically and morally defensible, a stand which may be ultimately correct, but according to Ouellette, “does not justify indifference to the potential physical, psychological, and social harms carried with implantation.”⁷⁵ Ouellette’s article is a powerful argument for inclusion of the deaf and disability rights perspective in “the bioethical conversation” and promotion of a disability-conscious bioethical approach to cochlear implantation.⁷⁶

VII. THE LAW: GLOBAL AND LOCAL

*Harpur – United Nations Convention on the Rights of Persons with Disabilities*⁷⁷

The next two articles tackle the law, both taking a different tack with one focusing on the UN Convention on the Rights of Persons with Disabilities and the other looking at a provision of California state law. Some Deaf people argue that because they are a linguistic minority based on usage of American Sign Language, they are not “disabled,” a term attracting historical baggage (e.g., stigma, ostracism). Thus, they advocate using the term “ableism,” instead of “disability discrimination.” While these arguments carry weight, using “all available tools to achieve social inclusion for all people regardless of their different abilities” is an important goal, according to Paul Harpur in his article, *Time to Be Heard: How Advocates Can Use the Convention on*

⁷³ *Id.*

⁷⁴ Hearing people always assume the accommodation is for the deaf person. It is not. It is for both parties to the communication. It is in the interests of hearing people to agitate for greater communication access because it facilitates the exchange of information, enabling hearing professionals such as doctors, lawyers, and financial experts to do their job in an ethical and effective manner.

⁷⁵ Ouellette, *supra* note 67, at 1268.

⁷⁶ *Id.* at 1270.

⁷⁷ Paul Harpur, *Time to Be Heard: How Advocates Can Use the Convention on the Rights of Persons with Disabilities to Drive Change*, 45 VAL. U. L. REV. 1271 (2011).

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the Rights of Persons with Disabilities to Drive Change.⁷⁸ Harpur's article examines the utility of the newly enacted UN Convention on the Rights of Persons with Disabilities ("CRPD") to non-government organizations and disability person organization advocates seeking change and law reforms in their communities. The American ratification of the CRPD in 2009 and the Obama administration's commitment to advancing disability rights, Harpur argues, has "substantially shifted the paradigm that guides domestic laws and policies."⁷⁹ In the first part of his article, Harpur looks at this paradigm shift in three sections. The first section traces the transformation of disability policy from the welfare model to the social model to a human rights agenda. The second section explores the CRPD as the paradigm of the human rights approach, and the third section develops some of the ramifications for this paradigm on the struggle of people with disabilities for gainful employment.

The second part of Harpur's article builds on the human rights agenda of the CRPD, taking into consideration the shadow reports and comments of the chair of the international monitoring of CRPD implementation, and proposing ways advocates can advance the CRPD's agenda, including law reform, reporting violations of the convention, litigation, and capacity building for the disability rights organizations. These strategies rely on the ability of these organizations to engage in advocacy on the basis of the CRPD. Harpur concludes that the social model must give way to the human rights paradigm embodied in the CRPD, which requires states "to embrace universal design and . . . to take various positive steps to ensure that all persons can exercise their human rights."⁸⁰

*Greer and Modell – California Penal Code Section 422 – Threats in ASL*⁸¹

Turning to a subject closer to home, California's state legislature thrice amended its criminal law on threats—whether terroristic, criminal, or credible—against people, and its appellate courts have interpreted the law to require an audible utterance to accompany physical gestures in determining whether a threat took place. Benjamin Thomas Greer and Professor Scott J. Modell argue in their article, *When a Threat Is Not a Threat: Why Persons Who Are Deaf or Hard of Hearing Are Left Unprotected by California Penal Code Section 422 and How the Courts Could Rectify It*, the

⁷⁸ *Id.* at 1271.

⁷⁹ *Id.* at 1272.

⁸⁰ *Id.* at 1295–96.

⁸¹ Benjamin Thomas Greer & Scott J. Modell, *When a Threat is Not a Threat: Why Persons Who Are Deaf or Hard of Hearing Are Left Unprotected by California Penal Code Section 422 and How the Courts Could Rectify It*, 45 VAL. U. L. REV. 1297 (2011).

California courts have it all wrong, and this mistake has left the state's deaf and hard of hearing community vulnerable to threats because deaf perpetrators signing in American Sign Language ("ASL") often do not make audible utterances. This results in a loophole for people making threats in ASL absent sound. Greer and Modell's article consists of an examination of one court's analysis of Penal Code Section 422 in cases involving threatening hand gestures; a look at the statute itself; and a proposal for interpreting section 422 to reach threatening ASL. According to Greer and Modell, terroristic threats communicated in ASL should fall within the gambit of Penal Code Section 422, and that ASL is just as "verbal" as English, thus warranting coverage by the statute. Using a totality of circumstances approach, Greer and Modell make the point that section 422's transmission or communication element covers ASL threats because "sign language is [the deaf and hard of hearing communities'] form of verbalization, thus making threatening sign language subject to Penal Code section 422 culpability."⁸² The article ends with a plea for American jurisdictions to ensure their criminal laws reach threats in sign language.

VIII. CONCLUSION

This special Issue of the *Valparaiso University Law Review* could not be more timely. Just as people of color and women realize forty-seven years after the Civil Rights Act of 1964 granted them equality of opportunity that the struggle is not over, so do people with disabilities, including Deaf and hard of hearing people, twenty-one years after the enactment of the ADA. Discrimination is far more de facto than de jure. Laws barring disability-based discrimination have been enacted, and a burgeoning legal industry based on disability law has emerged. Employers and public accommodations have hired lawyers to help them understand their obligations under federal and state antidiscrimination law, and there has been stiff resistance to inclusion and access (e.g., Clint Eastwood as defendant in an ADA suit against his motel,⁸³ and the *Board of Education of Hendrick Hudson Central School District* case that has defined the IDEA to this day⁸⁴). Discrimination, denial of due process, and structural barriers in the landscape depriving people of communication access implicate our ideas of liberty, justice, fairness, integration, and our respect for the culture and language of the Deaf

⁸² *Id.* at 1310.

⁸³ *Brunnen v. Mission Ranch*, No. 97-CV-20668JW, 2000 WL 33915634 (N.D. Cal. Dec. 19, 2000).

⁸⁴ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 200 (1982).

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community. The promise of the ADA remains unfulfilled despite laudable progress, and the special Issue of the *Valparaiso University Law Review* represents a singular effort to establish a link between the practical concerns of the Deaf community in the United States—a good education, a satisfying job, and access to the benefits and advantages of citizenship—and the academic world of scholarship. The idea behind the special Issue is that the practical concerns of members of the Deaf community raise important and pertinent concerns worthy of scholarly inspection, analysis, and discussion. The Issue gives voice to the overarching themes of communication access, allocation of costs, enforcement of rights and remedies, education, and respect for Deaf culture and American Sign Language. The goal is to direct attention to the needs, aspirations, and dreams of this small community that is based on a visual language of extraordinary beauty and expressive power, and to raise important issues that need full airing.

Two major developments at Syracuse University, my professional home, have important implications for the Deaf community. First is the idea of going “beyond compliance” in thinking about access. A student organization I helped found in 2001, the Beyond Compliance Coordinating Committee, promotes compliance as merely the floor upon which the University creates an edifice of inclusion, access, and equality for everyone—students, faculty, staff, administrators, and community members.⁸⁵ The law is just the starting point, not the endpoint, and the University has publicly proclaimed its creed that all students at the University are entitled to full, inclusive, and equal access to the life of the University.⁸⁶ Disability is seen as an aspect of diversity, and inclusion and integration are highly valued. Syracuse and its College of Law offer an enlightened model for the legal profession to emulate: an attitude that welcomes access and universal design as essential to a just society. Deaf scholars and their allies in the professional academy and the world of practice must start talking about going beyond compliance so that we frame the debate in terms that help advance the struggle for a better life.

The second development concerns a buzz word in academe: “cross-disciplinary.” The Deaf community presents so many rich contexts for exploration—employment, education, health care, legal and financial relationships, and family care. Syracuse University places great emphasis on the importance of cross-discipline collaboration, and Chancellor Nancy Cantor’s signature program is Scholarship in Action,

⁸⁵ See *Beyond Compliance Coordinating Committee*, BCCC, <http://bccs.syr.edu/> (last visited Mar. 10, 2011).

⁸⁶ See *The Office of Disability Services*, SYRACUSE U., <http://provost.syr.edu/provost/Units/academicprograms/DISABILITYSERVICES/index.aspx> (last visited Mar. 10, 2011).

holding forth a core value of the University that “accept[s] the challenges and the opportunities of our public missions, engaging with our communities in scholarship and education . . . today and in the years ahead.”⁸⁷ Chancellor Cantor’s vision is imbued “with a firm belief that individual growth and well-being is largely a function not of what we do in isolation, the thoughts we have by ourselves and about ourselves, but rather of the things we do together.”⁸⁸

Professors and scholars from various disciplines are working together, bringing their own background, knowledge, expertise, and insights to each other and to their community partners. For example, the problem of communication access in the medical setting has long been a concern of mine.⁸⁹ This concern has led to a project involving Professor Marjorie DeVault of the Department of Sociology at Syracuse University, Professor Rebecca Garden of the Center for Bioethics and the Humanities at Upstate Medical University, and me as representative from the College of Law. Professor DeVault, a noted sociologist and researcher who has done extensive work studying families, Professor Garden, who studies medicine and the humanities through the lens of narrative, and I, a clinical law professor with a strong background in disability rights and disability studies, are working to better understand the dynamic between deaf patient, doctor, and interpreter. The goal is to try to develop an alternative to litigation by enhancing communication and understanding between the parties in the medical setting. We are working with doctors, nurses, physician’s assistants, and office personnel on the one hand, and deaf patients and interpreters on the other hand, hoping to stimulate a conversation that will lead to better communication access for all concerned. It is progressively oriented as a way forward in helping a community, and it is very exciting work. The Deaf community is our intended beneficiary, and so are the medical and interpreting communities.

⁸⁷ Nancy Cantor, Chancellor, Scholarship in Action and the Public Mission of Universities, Baylor University Presidential Inaugural Lecture Series, (Dec. 7, 2010) (transcript available at http://www.syr.edu/chancellor/speeches/Baylor_final.pdf).

⁸⁸ Nancy Cantor, Chancellor, Keynote Address, Scholarship in Action: Building the Creative Campus, Syracuse University (Apr. 11, 2005) (transcript available at <http://soulofsyracuse.syr.edu/multimedia/ChancellorsKeynoteforApril11.pdf>).

⁸⁹ As Assistant Attorney General for the New York State Department of Law’s Civil Rights Bureau, I litigated the first ADA case involving the power of the New York State Attorney General to bring an action under the ADA under its *parens patriae* power; the judge ruled that given New York’s interest in the health and safety of its deaf population, it had standing to sue for discrimination as long as a practice or policy affected a discrete number of people. *People by Vacco v. Mid Hudson Med. Grp., P.C.*, 877 F. Supp 143 (S.D.N.Y. 1995).

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My youthful struggle with inaccessibility masked a deeper struggle within myself for I grew up rejecting my deafness. I realized from an early age that deafness was stigmatized and regarded abnormal and fought so hard to be “hearing.” So as the world was inaccessible to me, I was inaccessible to myself. It was not until I discovered sign language at age 22 that a new world fell into my hands, like “a little word from the fingers of another fell into my hand that clutched at emptiness.” Like Helen Keller, “my heart leaped to the rapture of living” when I accepted my deafness, mastered sign language, and took my place in the Deaf community.

I have come home, and it is accessible.